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Journal *of the* American Judicature Society

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EDWARD H. WARREN

AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

THE AMERICAN JUDICATURE SOCIETY

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 26 AUGUST, 1942 Number 2

"If Liberty Is to Be Preserved"

JACOB M. LASHLY

If liberty is to be preserved or appreciated, it will be because it is laid upon a foundation of justice. A willing and consecrated citizenry can be expected to strive and to fight for the institutions of democracy if it is convinced of their efficacy as an instrument for betterment of the human spirit and advancement of the common good. This means that justice must come from the courts; the experience of a litigant in that institution must be reasonably satisfactory. His cause must be heard patiently and openly, and decided fairly and promptly. The achievement of this end is to be expected only through an intensified effort for improvement in methods of administration of justice in the courts and in the executive agencies. This is the special task of lawyers. Its accomplishment shall be their particular contribution to the solidarity of the nation and a preparation for the enemy so formidable that he will not be able to destroy our kind of world.

Annual Meeting in Detroit this Month

THE AMERICAN JUDICATURE SOCIETY will hold its annual meeting at the Book-Cadillac Hotel, Detroit, Mich., Tuesday, August 25, 1942. There will be a breakfast at eight o'clock, followed by a business meeting at which reports of officers will be received and directors elected, and then a short directors' meeting for the election of officers. Details will be announced in the convention program of the American Bar Association, and adjournment will be in time to permit attendance at the ten o'clock section meetings of that body. In view of the transportation shortage an elaborate program has not been prepared, and members are urged to attend only if they plan to be in Detroit at that time anyway.

Limitations of space have prevented publishing in this issue the names of recently enrolled new members. They will appear in the October JOURNAL. Total new members from last October through July was 1,273.

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"Mighty Oaks"—Pretrial

GEORGE E. BRAND*

THE EDITOR of this JOURNAL made no overstatement when, in 1933, he wrote:

"But the pretrial procedure will remain so effective from the viewpoint of every interest, that it can never be abandoned."[1]

The employment of pretrial procedure in the state and federal courts is now nationwide and the results have been amazing. No single development has done more to produce a prompt and efficient administration of justice in civil litigation.[2]

The movement for reform of judicial procedure in this country was for the simplification of pleadings; sham pleadings were forbidden, general demurrers and general issues were abolished, explicit denials or admissions were possible, and in some states verification of pleadings, were required.

Dr. Sunderland points out that, except for an unfruitful New Jersey rule in 1912 adopting an antiquated English rule on summons for directions—

"No other definite attempt to provide a pretrial procedure, supplementary to the pleadings, for laying a proper foundation for the trial, seems to have been made in the United States prior to the remarkable effort of the circuit court of Wayne County, Michigan, sitting in Detroit, which began in 1929. * * *

"This procedure in Detroit was developed by the trial court itself, without any legislation, and without any reference to the English plan."[3]

The purpose of this article is more intimately to record the interesting story of the initiation and early development of the effort referred to, which has culminated in a nationally approved pretrial procedure.

The story really begins in 1926. The great expansion of building construction in the Detroit area before the crash of 1929 produced a heavy volume of mechanic's lien litigation in the Circuit Court of Wayne County, Michigan. Under the state practice the lien of a laborer or materialman was foreclosable only in chancery by bill of complaint making the owner, mortgagors, and all other lien claimants defendants. They could obtain affirmative relief on cross bill. The average suit involved several defendants—generally represented by separate counsel and, in many instances, there were a dozen or more litigants before the court. Trial of such cases was difficult to procure because of the number of counsel and because of the time necessarily consumed in submitting proofs. Seldom was one lienor informed as to the number of loads of sand or the quantity of bricks, cement, lumber, and so forth, or of the hours of labor, payments, credits, and so forth of another lienor. Averments of "insufficient knowledge," tantamount to a denial, were usual in the defense pleadings; thus requiring submission of testimony. The result was a particular congestion in lien litigation.

Early in 1926 the judges of the Wayne Circuit Court began to give special attention to the matter of the call and assignment of cases. In May they directed that all mechanic's lien cases be segregated and assigned to Judge Ira W. Jayne; testimony to be taken before a circuit court commissioner whenever possible.

What Judge Jayne did in breaking the jam of the lien docket has been graphically related:[4]

"The Judge simply took down the statute books, brushed away the cobwebs, called in the attorneys of the Detroit Bar. He explained to them his method, and what he thought could be accomplished . . .

"The Judge then consulted the Wayne County Bench consisting of fourteen judges and received their approval. He then ordered a lien docket to be published, setting all lien cases for trial as soon as they became at issue, rather than waiting three years for them to come on the regular docket. All cases were set for a certain day, at which time the Judge requested

*Of the Detroit bar.

1. Vol. XVI, No. 5, Journal American Judicature Society, page 137.

2. Some of the writers or speakers on the subject state that pretrial procedure did not originate in America; referring to the English practice of general summons for directions, the Scottish adjustment of issues, and the formulary proceedings of ancient Rome. See Theory and Practice of Pretrial Procedure (Sunderland) Vol. 21, Journal A.J.S. Dec. 1937, page 125; Speedy Justice in Ancient Rome (Kocourek) Vol. 5, Journal A.J.S. 1921, page 101. As to the English practice on summons for instructions before filing pleadings Dr. Sunderland concludes: "Hearings prior to 1932 in fact tended to become a matter of routine."

3. Vol. 21, Journal A.J.S., page 130.

4. Vol. 9, National Retail Lumber Dealer (Smith, Frank Day) 1929, page 3.

each attorney to state the merits of his claim and his defenses, resulting in a determination at the outset upon the points at issue in each case . . .

"The Judge's plan in securing cooperation among attorneys whereby the 'cards were all laid on the table,' that is, the contracts, the delivery tickets and other necessary papers were exhibited freely by the attorneys and argued before the Court, as a preliminary procedure, resulted in many cases being settled or otherwise disposed of according to the facts and law revealed by the preliminary 'get-together' of attorneys and litigants.

"Instead of handling one case a day, the Judge would take on from five to ten cases and would dispose of the same satisfactory to all parties . . ."

When admissions of delivery, and so forth did not result, proofs were taken before circuit court commissioners, or notaries, and on the transcript the court heard arguments and rendered decision. Despite the fact that he performed other judicial duties about half the time, Judge Jayne, in two years, reduced the number of old lien cases from over five hundred to less than thirty and disposed of all but fifty-eight of the eight hundred new lien cases started in the meantime.[5]

In 1929 the law docket was almost four years behind and the regular chancery docket two years. As a means of relieving the latter situation the procedure as to lien cases was extended to mortgage foreclosure cases. Judge Jayne was elected Executive Judge by his fellow judges and was given entire administrative control of the work of the court and complete supervision and charge of the calendar; a position which he still holds.

In January 1930 the procedure was extended to such other chancery cases in which the Executive Judge ordered references for taking of testimony. By this expedient the judge obtained a "preview" of each case that went upon this docket. The result was the reduction of issues, settlements, limitations of proofs, and early decisions on such issues as required proofs. The docket was called the "reference docket." At present all chancery cases are placed upon the docket which is now known as the "chancery pretrial and reference docket."

In August 1930 the judges decided to extend the procedure to law cases. A Conciliation Docket was established and Judge Adolph F. Marschner was assigned to it. Notwithstanding the handicap that the request for conciliation conference was left entirely optional with the attorneys, Judge Marschner was able to report conferences in fifteen per cent of the cases and nearly one hundred settlements in two months. In March 1931 Judge Arthur Webster took over this assignment. He has been responsible for many improvements in the procedure, particularly with respect to the incorporation of a formal pretrial report as part of the file. On December 2, 1931 attendance of attorneys at the call of the conciliation docket was made requisite and Judge Joseph A. Moynihan took over the assignment.

On February 1, 1932 the judges instituted a pretrial docket for all law cases. This docket is now known as the "pretrial and conciliation docket." Attendance of attorneys was made mandatory. A supplementary rule provided power to enter judgment and so forth in case of nonattendance. This rule was subsequently upheld.[6] For two years Judge Moynihan handled this docket, working out a procedure and technique which produced results that startled the judiciary of this country.

In the first ten months of 1932 Judge Moynihan disposed of 737 cases on this docket. His work attracted the attention of the Editor of this JOURNAL, who made a study of this development and published his report as "Pretrial Procedure in Wayne County," 21 Journal American Judicature Society (1933) page 136. In the course of that report Mr. Harley made the prediction quoted in the first paragraph of this memorial.

Lay publications and organizations sent their representatives to Detroit to study the pretrial system. The report of one of them appears in The Annals of the American Academy of Political and Social Science[7] in which it is said:

"Judge Jayne recognized at the outset, however, that his control over the assignment system suggested a corresponding duty to exercise some effective supervision over the cases which were assigned for trial . . .

"Starting with the chancery calendar, there-

5. See also Sixth Annual Report, Judicial Council of Michigan, 1936 (Cooper) page 64, and Vol. 14, Journal A.J.S. (1931), page 174.

6. Konstantine v. City of Dearborn, 280 Mich. 314. Failure to propose amendment to pleading at pretrial conference justified refusal of trial judge to permit amendment upon the trial.

7. Vol. 167 (May, 1933) pages 14-17.

fore, he established a preliminary call or docket which he calls the 'reference docket' . . .

"By means of this reference docket, the Presiding Judge simplifies the pleadings or narrows the issues in some cases and settles others. He thus weeds out of the chancery calendar everything but contested issues, and, during the year, disposes of a large number of more or less formal actions or proceedings which require some judicial supervision or attention before entry of judgment, but which do not require an actual trial. In November 1932, for instance, he disposed of 166 cases on this calendar, and during the three months from September 1 to November 30, 1932, he disposed of 486 cases. In addition, of course, he eliminated immaterial and uncontested issues and thus narrowed the controversy in many other cases.

"The success of the reference docket in extracting from the chancery calendar all but actual contested issues of fact and of law was so marked that in March 1932, Judge Jayne established a similar preliminary call or docket in the law calendar. This he calls the 'pretrial and conciliation docket.' This docket is an evolution, and its name gives some indication of its origin. It began as a conciliation docket . . .

"In November 1932, Judge Moynihan, who has had great success with this docket, disposed of 127 cases. In the three months from September 1 to November 30, 1932, he disposed of 271 cases in addition to those which he simplified and narrowed as explained above."

Articles also appeared in the Christian Science Monitor and the Reader's Digest. Numerous articles appeared in bar journals and legal publications. Judge Moynihan addressed numerous bar associations throughout the country on the handling of pretrial.

From time to time the assignment to the pretrial docket of law cases has passed to the other members of the court, each of whom has contributed new ideas for improvement. Judge Jayne has continued to handle the chancery pretrial docket.

Judges from various courts of other states began to come to the Wayne Circuit Court to study the system. In 1935 the Detroit system of pretrial procedure was adopted by the Superior Court of Suffolk County, Massachusetts, sitting in Boston. Other courts did likewise.

The incorporation of a provision for pretrial procedure in the Federal Rules of Civil Procedure was a crowning recognition of the efficacy of the pretrial procedure in all civil cases.

Survey of Recent Progress Is Stimulating

THE JOURNAL has from time to time mentioned committees and commissions created in a number of states for the purpose of making critical and affirmative studies in the field of judicial administration. It is no easy matter to keep abreast of the news in this field. The Society's members are prone to assume that the Society's office is somehow kept informed. In reality, it is kept informed, but sometimes at a late stage.

The proofs of an unprecedented volume of constructive labors by lawyers and judges came to the Editor in June and early July. It has been no easy task to merely skim through these reports. To treat them as fully as should be would require at least five times as much space as can be made available. The most practical course seems to be that of submitting this interesting news in a compact form.

EXCELLENT WORK DONE IN NORTH DAKOTA

We may as well begin with North Dakota, because the official code commission fears there would be prejudice if the product of the drafting committee were made public before final action. Several pages could profitably be devoted to the numerous interesting and instructive proposals, which have been outlined only in fifteen legal cap pages, with 61 paragraphs concerning civil procedure and 59 concerning criminal procedure. This impressive work has been under way for a long time, its leader, Judge Grimson, having been excused from holding court. He has been assisted by four practitioners, A. M. Kvello, Nels G. Johnson, E. T. Conmy and John J. Kehoe.

The recommendations extend from those of relatively minor importance, that probably have never before received adequate consideration, to the most conspicuous and important topics now pressing for reform. The drafting committee has had the advantage of sufficient time and strong support by a majority of the bench and bar. Argument there will be, as a necessity, but it appears highly probable that North Da-

kota will greatly profit from this well planned campaign. The new rules will be subject to supreme court approval, but it is proposed also to have them enacted in order to foreclose debate on the question of "substantive law" having squeezed in with the adjective law. Unless there is somewhere a tragic blunder North Dakota will within a year occupy a high place among the progressive states. [see also 26:43, August, 1941]

A MARYLAND REPORT

The Maryland Commission on the Judiciary Article has released an interim report dated June 1, 1942. This state stands virtually alone in requiring most of its high court judges to try cases in their circuits. It is now proposed that they be permitted to devote all of their time to their appellate work, except that the Chief Judge may in his discretion, assign them to trial work and may also assign any trial judge to sit with the Court of Appeals when needed. In this state the judicial term of office is fifteen years. The Commission proposes a plan which, after a number of years, would reduce the number of judges of the Court of Appeals to five. The proposal is offered that judges of the high court should be appointed by the governor; and there is a discussion also as to the matter of permitting voters to pass upon a judge's tenure after a period of service.

For thirty years the Bar Association of Baltimore City has sought unification of the city's six courts, each being wholly independent and with its own clerk. Three judges work singly in law cases and two in equity, with the sixth in the criminal field. It is recommended that there be a single court with one less judge.

The report is followed by a vigorous protest made by Judge F. Neal Parke, who believes that not enough judges are provided. A more important objection is that the report "advocates depriving the members of the appellate bench of the advantage of continued experience in the actual application of the principles of law and its procedure, of observing their incidence in litigation and in the prosecution of crime, and of being brought in contact with the practical affairs of finance, commerce and life."

The proposal that a judge, after a reasonable period of service, stand for election, his only opponent being a lawyer who has obtained the names of 5,000 qualified voters on his petition, is scoffed. "It would be difficult to induce the best qualified, competent and established lawyer to give up his practice for a short period with the prospect of encountering at the polls the nominee of 5,000 men and women whose only qualification may be that of the right to vote. *The power of appointment is limited in its operation to those who will accept.*"

[Maryland has not endured as much experience with elected judges as have many other states. A considerable amount of idealism must be excused.]

STUDY JUDICIAL SELECTION IN ARIZONA

In 1941 the Arizona Special Committee on the Administration of Justice induced the State Bar to create a special committee on judicial selection, tenure and retirement pay. The plans favored are very similar to those adopted in Missouri, which have been highly praised. At the annual meeting of the State Bar in Tucson last April the State Bar provided a committee to "contact service organizations throughout the State, livestock growers' associations, tax research associations and other quasi-public bodies to educate their members and obtain, if possible, their support to a constitutional amendment which will give Arizona the best possible means for insuring the selection and retaining of able judges.

LEGAL ETHICS IN CRIMINAL FIELD

An original and important service has been rendered by the New York County Criminal Courts Bar Association in the production of a Code of Ethics and Principles for the Prosecution and Defense of Criminal cases. The drafting was done by a committee comprising judges, prosecutors and lawyers versed in criminal law practice. The leader in drafting was Chairman Robert Daru.

The JOURNAL will present the text of this code in a future number.

IMPROVING APPELLATE PROCEDURE

A field that has long appeared to deserve critical attention, that of procedure in the appellate field, has been under study in Indiana. Mr. Louden L. Bomberger has taken special in-

terest in this work and has acted as chairman of the sub-committee. The report will be available after action taken when the Indiana State Bar Association meets.

INTEGRATION MOVEMENT IN KANSAS

Secretary Robert M. Clark of the Kansas State Bar Association reports progress by a committee which has brought some of the younger members into service. Present plans include instruction of every representative and senator in the state on integration values by lawyers who are locally well known for their integrity. It takes a lot of work, but it has to be done sometime.

NEW CRIMINAL LAW CODE IN LOUISIANA

A complete revision of the substantive law of crimes is exceedingly rare. Without reflection on the vastly important procedural rules and judicial machinery it is obvious that a body of statutes added to every few years over a period of a century, more or less, is in need of revision.

This ambitious work has been completed in Louisiana and becomes effectual on August 1, 1942.

The Louisiana State Law Institute is a sort of superjudicial council. To it goes the credit for what appears to be an exceedingly rational and consistent statement of criminal law. The 150 page report dated May, 1942, represents about two years of active study and drafting. It was presented to the legislature of this year as a "Projet of a Criminal Code," and was altered only slightly before adoption.

The JOURNAL is informed by a modest participant in this significant project that credit should be bestowed first on the faculties of the three local law schools, and secondly on John H. Tucker, organizer of the institute and president until recently called to military duties; from that point Dan Debaillon, his successor as president. Nor must all others, and especially the intelligent legislators, be forgot in bestowing credit. A service has been rendered to the entire country. The text of criminal law should be orderly, and complete. A mere disordered mass of accumulated acts is a reflection on the legal profession. Legislators come and go and virtually escape criticism.

WISCONSIN PROCEDURE COMMITTEE REPORTS

Wisconsin's Advisory Committee on Pleading, Practice and Procedure filed a submission in the supreme court June 1, 1942. The ten pages deal with four proposed amendments, two repeals, six new sections, and one to be repealed and "recreated."

Wisconsin has been fortunate in its lawyers and judges. It never allowed its procedure, derived from the Field code, to be ripped to pieces as did a number of states. It has long had a legislature more progressive in developing an art of legislating than most states. Detailed study of procedural rules—or rather, observation of their operation by qualified critics—is an exceedingly useful function. The recent report is signed by Chairman A. W. Kopp and Secretary E. E. Brossard. Since 1929 the Wisconsin supreme court has exercised rule-making power. The court also has had the assistance of a "rules committee."

MIRACULOUS RECORD OF BAIL BONDS

Reports on the working of the Detroit city criminal court, the only court in the country that has complete jurisdiction of all offenses against city, county and state laws, have been made in the JOURNAL from time to time since this extraordinary court was established. Extraordinary, but the simplest and most effective type of criminal court known, and after twenty-one years of success it has no competitor. The court has suffered severely because of short tenure, politics and the "advancement" of some excellent judges to the Wayne County court. Daily work for long periods in the criminal field is much more strenuous than when a majority of cases are civil cases.

In the first year this court, officially known as the Recorder's court, reduced the number of the four major crimes of violence fifty-eight percent. And still it took several years to prove to criminals that Detroit had means for coping with them.

The only right way to select jurors—the key-number system—was adopted in Detroit ten years ago. Its adoption elsewhere is limited. One is forced to believe that there is no great demand for juries made up from the more intelligent eligibles. This prejudices standards of justice, but has the undoubted merit of

offering temporary employment to a number of persons who find it most difficult to earn a living.

This comment introduces the annual report by A. J. Paul, head of the bond bureau of the Recorder's court. Each year Mr. Paul presents miraculous figures. His detailed sheet shows that since the bond department was set up eleven years ago the total amount pledged for bail amounted to $12,223,830. At the end of eleven years Mr. Paul has to report that the bonds "remaining forfeited on our records" total $4,300. But "cash deposits totalling $4,300 have been made with the Wayne County treasurer, under the rules of the court, to protect these seven forfeitures until final action by the prosecutor."

In one city which ought not to be named there were years when the figures just quoted would have served pretty well if reversed.

The mode of checking on bondsmen is not simple, but it is everlastingly accurate. The consequence is that a large number of accused persons and witnesses have been given the temporary freedom which the law intends; the dangerous criminals are held; the City has fewer guests to house and feed.

Officials interested in making criminal justice more effective can learn all the details in Detroit.

NEW JERSEY PROSECUTOR MAKES CRIME PAY

Lloyd C. Fisher, prosecutor for five years for Hunterdon County, New Jersey, on completing his service rendered a report which was published in the *Hunterdon Republican*, June 11, 1942.

In those five years 1,178 respondents were dealt with by the prosecutor's office. *There was not a single court trial.* Twice as many cases were reported as in any former five year term, and more than twice as many arraignments.

During the preceding term fines paid amounted to $12,000. In the recent term fines to the amount of $45,250 were imposed, and payment to the amount of $43,095 has been collected, or is being collected on a regular basis.

No doubt Prosecutor Fisher would concede some element of luck in this amazing record. But mainly it must be attributed to skill, good judgment and tireless endeavor by the prosecutor. Considerable credit goes also to the police and detectives, who can so readily muddle a case.

Of the 1,178 convicted persons there were three charged with murder. Other offenses were: burglary and robbery, 226; assault, 149; obtaining money under false pretense, 135; larceny, 124; passing a bad check, 117. The state prison received 68 convicts; 194 were distributed among four reformatories, 153 were placed on probation and 253 paid fines.

In a well governed state prosecutors would be appointed and would be given assistance and supervision by the attorney-general's office.

The retiring prosecutor told of the serious need of a force of probation officers. The 153 offenders who were subjected to probation were dealt with by volunteers . . . Thomas C. Carter, county Y. M. C. A. agent, who served without pay, and Ray Bastedo, county detective.

The cost of maintaining the office of prosecutor increased $7,000 over the preceding term; the money already collected in fines amounts to more than $30,000 excess over the preceding term. The cost of a probation system is estimated to be $3,000 a year. The county received about $12,500 dollars above all expenses. For the first time crime has been made to pay, in a purely bookkeeping way.

Flemington, the county seat of Hunterdon county, is forty-five miles west of Manhattan Island, an ideal location for the training of ambitious police and prosecutors.

NEW MEXICO ACCEPTS FEDERAL RULES

After thorough consideration the bar and bench of New Mexico has followed the course taken in Arizona, the result being adoption of virtually all the rules of civil procedure which are not peculiar to the federal practice. The question was debated at several annual meetings of the State Bar, there being, as is always the case, a considerable reluctance to abandon long standing rules. The matter was determined by the Bar at its meeting in October, 1941, by acceptance of a printed report submitted by a committee. There were present Chief Justice Brice and several other members of the supreme court.

From a report made to the JOURNAL by Edward C. Wade, of El Paso, Texas, the following

information is quoted: there are 86 new rules. The numbering conforms precisely and the rules in substance are similar to the federal rules. The rules governing appeals, however, were not adopted.

New Mexico's declaratory judgment law of 1935 has served well and is now reinforced by federal rule 57 which permits, in certain cases, the use of a jury. In a compilation of all New Mexico statute law the new rules will be included with annotations.

Mr. Wade reports strong opinion in the New Mexico Bar in favor of the new rules and adds: "New Mexico is fortunate in having a progressive supreme court which is entitled to commendation for giving effect at this time to the expressed desire of a majority of the members of the New Mexico Bar."

Unprecedented Success In Criminal Courts

Grand jury investigation began in Wayne county, which includes the city of Detroit, on August 21, 1939. Judge Homer Ferguson, of the Wayne County Circuit Court, was assigned this work. In the latter part of May, 1942, he considered his task nearly completed.

The report which follows is taken mainly from the *Detroit News*, a reliable source of information.

In Michigan any judge or justice, since 1917, has possessed by statute all the powers of a grand jury. It is probable that a conventional grand jury has not been called since 1917. Judge Ferguson is believed to be the only judge who dealt with more than one investigation at any given time. He found it advantageous to initiate two additional lines of research, and the three projects were carried along simultaneously.

The results have been startling. For more than two years trials have been in progress in the Wayne Circuit Court and in Detroit's Recorder's Court, the jurisdiction of which is limited to the city. The Recorder's Court is probably the only criminal court in the country which possesses both misdemeanor and felony jurisdiction. Its judges carry complete responsibility for the enforcement of criminal law in Detroit.

Told briefly, Judge Ferguson has returned forty-three indictments naming more than five hundred respondents. One investigation was of "gambling graft;" one an exposure of crime in connection with a public project; and the third, corruption in county offices.

"Among those convicted and sentenced are Richard W. Reading, former mayor of Detroit; Fred W. Frahm, former superintendent of police; Thomas C. Wilcox, former sheriff, and Duncan C. McCrea, former prosecutor. Former city council members Harry I. Dingeman and John Hamilton, and former county auditor Edward F. Williams, pleaded guilty to charges of accepting graft in county purchases."

Conspiracies among law enforcement officers and racketeers in "the handbook, policy-and-numbers and county vice rings" were exposed.

PROSECUTOR'S BRILLIANT WORK

Judge Homer Ferguson is unstinted in praise of Prosecutor William E. Dowling, who "worked long overtime hours, got little sleep and never complained. He was invaluable to the investigations."

"The grand jury staff at its peak consisted of fifty persons, including some crack investigators whose names were never divulged. It was a staff of private investigators, veteran and young police officers, and attorneys. They worked together like a football team that was always trying to score more touchdowns after the score was 100 to 0 against their opponents.

"Their integrity and honesty was never in question, though they could have given away grand jury secrets anytime that would have dynamited the grand jury inquiries. Seven court stenographers worked in relays taking millions of words of testimony in more than 40,000 pages of secret transcripts of testimony."

PROTECTION OF WITNESSES NECESSITY

In any other state there must be as much protection of witnesses as is found possible, but gossip is pretty sure to break down the best efforts. Not so in Judge Ferguson's research. He was able to guarantee full concealment to

witnesses who should not have been expected to cooperate. The *Detroit News* tells the story as follows:

"At one time, Judge Ferguson had two suites of offices on separate floors and still another office as a witness room in the National Bank Building. This was done to insure the grand jury absolute secrecy.

"Judge Ferguson's grand jury was often described as a 'portable grand jury' by his aids because he took testimony anywhere, sometimes in a hotel room, at a witness' house, at the home of a member of the grand jury staff.

"All he ever needed to go into session was a grand jury prosecutor and a court stenographer—and an interesting witness. He offered witnesses every precaution for their safety, and evidently this is one of the reasons his grand juries were so successful.

"There were disturbing elements, however. A man who later worked for a gambler under investigation tried to hire out as a grand jury investigator. Another who was suggested to the grand jury as an expert who could keep its telephone wires from being tapped was found on a wire service payroll, Judge Ferguson once revealed.

"Despite many obstacles and long exhaustive work, Judge Ferguson indicted many men in high places in public life and many others in low places, who thought they were immune and could buy special privilege. Many of them have been already convicted by court juries and sentenced."

. . . . . .

"Though the grand jury is winding up, its contributions to law enforcement still remain, some of the public officials convicted still lingering in the public nausea as horrible examples of the old free-and-easy days when a public official could be 'on the take' without fear of reprobation."

Every judge and every law-enforcement official should know what can be done when the function of judicial probing is given a better tool than the typical modern grand jury, a ponderous machine, but one that semed to be necessary before the Michigan legislature produced a simpler, more efficient, more prompt and more responsible agent. Before this enactment Michigan was listed among the states in which a grand jury indictment was not essential to bring a person accused of committing a felony to trial. Preliminary examinations were conducted by local prosecutors before justices of the peace. This still suffices for ordinary criminal cases; but where conspiracies exist ther never has been an efficient weapon until the "one-man grand jury" act was passed. There may be no more *indictments*, but there are a great many more convictions. The law now accomplishes its fundamental purpose.

Is there any danger of miscarriage of justice?

The answer is that *the accused has every right accorded to an innocent person.*

Closely following the newspaper article above quoted, the Michigan supreme court sustained the sentence of three years imprisonment in the Ewald case and at the same time validated many convictions based upon Judge Ferguson's investigations. Against the claim that only the Recorder's Court judges could investigate crime in Detroit the court held that the circuit court judges had a concurrent jurisdiction; that Judge Ferguson was correct in sending the Ewald case to the Recorder's Court for trial, and that Judge Skillman had not erred in the trial of certain prominent respondents.

It appears to be true that there has never before been any such destruction of criminal conspiracies and imprisonment of lawless and influential officials. The achievement is due of course to resourceful officials, but without the Michigan "one-man grand jury" law this marvelous success would have been impossible. Twenty-five years ago the Michigan legislature, on suggestion by the State Bar, adopted the act which empowers every judge and justice to exercise all the powers of a grand jury. It appears to be a fact that no old-fashioned grand jury has been summoned since that law was enacted.

No other state has followed this example. In some of them still a grand jury must find an indictment in every felony case before an offender can be put on trial. Usually this routine use of the grand jury is perfunctory, because the offenders are already in the county jail. But it's glory for the prosecutor to have virtual control of a group of voters, and judges do not wholly ignore the advantage of having an audience of proud citizens.

In other states the grand jury is summoned only when there appears to be a special need, perhaps only once or twice in a lifetime in the typical county. Regular sessions in advance of a term of court are really never needed. The rare use of the grand jury, where permitted,

is due to the fact that convictions depend far more upon secret work done by police and sheriffs than upon the clumsy and leaky grand jury. For every state except Michigan the success in Detroit is a challenge to wake up and follow a brilliant example.

The files of the JOURNAL contain several very illuminating articles concerning the grand jury. One by Justin R. Miller, now a justice of the U. S. Circuit Court of Appeals, District of Columbia, 8:99. Judge Pliny Marsh described the Michigan departure in 8:121. Other articles on this important subject are listed as follows: 6:91, 15:95, 18:36, 23:25, 26.

Federal Judges Shall Retain Power to Sentence

The Committee on Punishment for Crime, created after considerable criticism had been expressed by federal judges of the recommendation for legislation which would deprive the judges of a large part of their power to determine punishment for crime, recently returned a report to the Judicial Conference, dated June, 1942, which relieves the judges of their fears, and in 126 pages presents interesting facts and proposals concerning modern methods of penology.

Readers of the JOURNAL will remember the forceful objections urged by Judge Merrill E. Otis in his article on this subject published in the December, 1941 number, 25:103. No reader, unless convinced that judges know less about crime, are less concerned about what happens after conviction, and more ignorant than others concerning penal treatment, could fail to agree with the author.

The committee appointed to further study the matter and the proposed law, after a number of judges had expressed dissatisfaction, was composed of Judge Parker, chairman, Judges Hand and Phillips, and District Judges Carroll C. Hincks, John C. Collet, Paul J. McCormick and Bolitha J. Laws.

The committee recommends that the judges retain the sentencing power; that in cases in which the offender is sentenced for more than one year the maximum sentence be imposed and that in the first months of the prisoner's term a board of corrections shall recommend to the court a sentence deemed most suitable, after which the judge "shall determine the definite sentence" within the maximum prescribed by statute.

This proposal is probably as far as irresponsible advisers can interfere with judicial power under the constitution. The advice now permitted can do no harm, and will probably be appreciated by the judges as one source of information. The whole matter of punishment is obviously one of guessing, and two or more guesses are better than one.

There follows several draft acts and a subcommittee report on "treatment of youthful offenders." The second Appendix is a most timely addition to data on the subject of youthful offenders. It describes in sixteen pages the Borstal System which has been used in England for half a century, and has proved more effective than any of our own penal experimentation. This valuable report was made by Leland L. Tolman, a permanent member of the staff of the Administrative Office. In ten pages Robert H. Scott and D. R. S. Morrison report on Los Angeles County forestry camps for delinquent boys. Forty-six pages present a summary of state sentencing practices and parole administration.

Judge Otis' important question—Has a judge constitutional power to impose sentences in cases tried in his court? appears to be answerable only in the affirmative. But the records show that legislatures in various states have bestowed this power upon other persons. It would be a wholesome thing to settle this question before further inroads are made upon judicial power. That the judge should willingly escape the odium of fixing sentences is natural. And our loose judicial departments have nobody to defend essential judicial power. "Experts" employed to perform this vital function of executing sentences are, in a practical sense, devoid of responsibility.

The Opportunity to Improve Jersey Justice

IN THIS issue the JOURNAL presents the full text of the judiciary article submitted as part of the revised constitution for New Jersey, to be accepted or rejected as a unit not later than November of this year. Every such attempt to modernize the judiciary article is significant. Similar work is now in progress in two or three other states.

To produce a model judiciary article is one thing, and it is an entirely different job, and a harder one, to reshape an article of long standing. What has well served must be retained; the best of newer principles must be introduced. The possibility of arousing the antipathy of demagogues is never for a moment absent from the minds of the commissioners.

The present submission well deserves study in every state. It preserves well tested features and introduces improvements which have not yet been acquired in any state.

New Jersey has been accustomed to appointment of certain judges by the governor and senate. The new text obliges the governor, in making an appointment to the supreme court, to choose a superior court judge who has had at least one year of experience. This limitation is excellent. It should be part of every constitution, as should also the provision that all superior court judges must have been in practice for at least ten years.

Consideration of the provisions for administration within the judicial system increases the reader's confidence in the virtues of this judiciary article. "The chief justice of the supreme court shall be the administrative head of all the courts, and shall supervise their work. He shall appoint an executive director of the courts to serve at his pleasure." This director shall assist in respect to finance and personnel; he shall "publish annually a statistical record of the judicial services of all the courts . . . and of the costs thereof . . ."

"Whenever the supreme court fails to hear any case within two months after an appeal therein has been perfected, or fails to decide any case within two months after it has been argued or submitted, the chief justice *shall* certify that fact to the governor." In which case the governor, in his discretion, may provide for the determination of appeals by a bench composed of superior court judges. And similarly, two months of delay in either the appellate or trial departments may be met by special appointments to the bench of judges to serve for not more than one year.

Here are the fundamentals of a successful, modern judicial system. If adopted the State of New Jersey will be in advance, as to vital requirements in judicial administration, of all sister states, and virtually on a par with the federal system, which has been marvelously improved in recent years.

Judicial Article in New Jersey's Proposed Constitution

THAT A state constitution should be open for revision at least once every twenty years may shock some lawyers. But it should be remembered that the constitutional protection of rights is a national affair; the states exist under one big tent. In a world subject to great changes the states may well serve the Union as experiment stations.

It was Thomas Jefferson who declared that constitutions should be subjected to study at least once every twenty years.

The state of New Jersey has got along with a judicial system that was shaped on English lines before 1776. There has been no amendment of the judiciary article in ninety-eight years. The state has long enjoyed a reputation for its administration of criminal law, which, being excellent, has benefitted also from comparison with that of other states.

A relatively good system of selecting judges, with security of tenure, has done much for Jersey justice. The practice act of 1912, which conferred rule-making power on the bench, opened the way to procedural reforms. The defects of the long established system derive from the constitution, and relate largely to the organization of the courts.

During recent months a capable commission

established by the legislature has drafted a revised constitution, and presented it in a convenient form. The introduction informs the reader that the document "is not a model constitution. It does not purport to embody the most advanced thinking of political scientists. It sets forth, instead, what your Commission believes to be the requirements to secure to New Jersey the benefits of experience in public affairs extending over a century and a half."

The drafting of all or parts of a model constitution is a most instructive line of study. The revision of an existing constitution is equally instructive and more difficult. A revision drafted with the hope of adoption notwithstanding the apathy of the ignorant and the audacity of the privileged is an adventure.

In several states at the present time work on the judiciary article or the entire constitution has been under way and will benefit from the prompt publication of the New Jersey revision. It is probably more compact than any existing constitution.

PROPOSED JUDICIAL SYSTEM

Section I: Judicial Power

1. The judicial power shall be vested in a supreme court and a superior court, and in inferior courts of original jurisdiction which may from time to time be established, altered and abolished by law. Such inferior courts may be integrated with the superior court in any manner and to any extent, not inconsistent with this constitution, as may be provided by law.

2. In all matters in which there is any conflict or variance between equity and common law, equity shall prevail, and subject to rules of the supreme court every controversy shall be fully determined by the justice hearing it.

3. The supreme court shall sit at the State Capitol and the superior court shall sit in each county. The supreme court and appellate divisions of the superior court shall hold at least ten monthly terms each year, and all trial courts shall hold such terms as may be fixed by rules of the supreme court.

Section II: Supreme Court

1. The supreme court shall consist of a chief justice and six associate justices. Five members of the court shall constitute a quorum. The presiding justice of the court shall designate a justice of the superior court to serve temporarily when necessary to constitute a quorum.

2. The supreme court shall exercise appellate jurisdiction in the last resort in all causes subject to the limitations imposed by this constitution. The court may, upon leave granted by a justice thereof, review any indictment before trial by certiorari. The court shall also have jurisdiction of the admission and discipline of attorneys and counsellors.

3. The supreme court shall make rules as to the administration of all of the courts, and, subject to law, as to pleading, practice and evidence in all the courts.

Section III: Superior Court

1. The superior court shall consist of such number of justices as may be authorized by law, but not less than twenty-five, each of whom may exercise the powers of the court, subject to rules of the supreme court. The superior court shall have original general jurisdiction throughout the State in all cases.

2. The superior court shall be divided into a law section, to exercise civil, criminal, and matrimonial jurisdiction, and an equity and probate section, to exercise all other jurisdiction of the court, each section having such parts as may be provided by rules of the supreme court.

3. Any justice of the superior court may grant prerogative writs, returnable in an appellate division which shall otherwise have original jurisdiction relating thereto, and shall determine in such manner as the rules of the supreme court may prescribe, and without a jury, questions of fact arising therein; or the hearing may be in the first instance before a single justice, whose decision, both as to law and fact, shall be reviewable by the appellate division.

Section IV: Appeals and Appellate Division

1. There shall be established in the superior court at least two appellate divisions. Each appellate division shall consist of three justices of the superior court designated by rules of the supreme court who shall hear appeals from designated sections of the superior court and such additional appeals from inferior courts as may be provided by law. Such justices shall be annually assigned for that purpose by the chief justice of the supreme court.

2. An appeal to an appellate division may be taken as a matter of right from any order of

the superior court. Appeals in cases involving restraints or the appointment of receivers shall, in whatever court pending, be preferred as to argument and disposition.

3. Judgments and orders of an appellate division shall be final, subject to an appeal to the supreme court. Appeals to the supreme court may be taken only:

(1) In capital cases and cases involving a constitutional question, which appeals shall be taken directly to the supreme court and shall be preferred as to argument and disposition;

(3) On certification of an appellate division; or,

(4) On certification by the supreme court to any court.

4. The appellate courts, in addition to considering questions of law, may also set aside judgments, wholly or in part, where the finding of fact is against the weight of the evidence, or the verdict is excessive or inadequate. The appellate courts may exercise such original jurisdiction as may be incident to the complete determination of the controversy.

Section V: Judicial Officers

1. The governor shall nominate and appoint, by and with the advice and consent of the senate, the chief justice and associate justices of the supreme court, the justices of the superior court, and the judges of any inferior court with jurisdiction extending to more than one municipality. The legislature shall provide by law for a uniform method of appointment of all other judges.

2. Each justice of the supreme court shall, prior to his appointment, have been a justice of the superior court for at least one year. Justices of the superior court shall, prior to their appointment have been counsellors at law in good standing for at least ten years.

3. The chief justice and associate justices of the supreme court shall be appointed to hold office during good behavior. Justices of the superior court shall hold office for a term of seven years and if reappointed shall thereafter hold office during good behavior. The issue of good behavior shall, with respect to justices of the supreme court, be triable by the senate, and with respect to all other justices or judges of any court shall be triable by the supreme court. No justice or judge of any court shall continue in office after he has attained the age of seventy years.

4. Justices and judges of every court shall, at stated times, receive for their services such salary as may be provided by law, which shall not be diminished during the term of their appointment. They shall hold no other office or position of profit in the government of this State, or of the United States, nor of any instrumentality or political subdivision of either of them.

5. Any judge or justice of any court in this State who shall become a candidate for an elective office under authority of this State or of the United States shall thereby vacate his judicial office. The justices of the supreme court, of the superior court and such other judicial officers as may be provided by law shall not during their continuance in office engage in the practice of law or other gainful occupation.

6. A justice of the superior court may exercise the power of a judge of any court established by law in the county or counties to which he may be assigned, and may hold any such court with like jurisdiction, powers and duties as a judge thereof.

Section VI: Administration

1. The chief justice of the supreme court shall be the administrative head of all the courts, and shall supervise their work. He shall appoint an executive director of the courts to serve at his pleasure. The executive director shall:

(1) Assist the chief justice in all matters related to the administration, finance and personnel of the courts;

(2) Publish annually a statistical record of the judicial services of all the courts, justices and judges in the State, and of the costs thereof;

(3) Prescribe records, reports and audits for the inferior courts;

(4) Have such other duties as may be del egated by the chief justice.

2. The supreme court shall appoint a court reporter and a clerk of the court, each of whom shall hold office at the pleasure of the court. Within each county, respectively, the county clerks and, as to probate matters, the surrogates, shall be clerks of the superior court.

3. The chief justice of the supreme court shall annually assign justices of the superior

court to counties, divisions, sections or parts thereof, and may from time to time transfer justices from one assignment to another as need appears.

4. Whenever the supreme court fails to hear any case within two months after an appeal therein is perfected or fails to decide any case within two months after it has been argued or submitted, the chief justice shall certify that fact to the governor. The governor may thereupon appoint a special term of the supreme court, from among the justices of the superior court, to exercise concurrently the jurisdiction of the court until the delay is cured.

5. Special judges may, upon request of the chief justice, be nominated and appointed by the governor, by and with the advice and consent of the senate, for temporary service not exceeding one year whenever and so long as any court fails to try or hear any case within two months after notice of trial has been filed or an appeal therein perfected, or fails to decide any case within two months after it has been argued or submitted. Such special judges may exercise all the powers and shall have all the duties of a justice or judge of the court to which they are appointed.

6. On or before December first in each year the chief justice shall file with the governor and the legislature a report of the work of the courts during the year ending September first next preceding.

MINORITY MEMBERS SCANDALIZE STATE BAR

Recent experience in New Jersey, accompanying the announcement that a revision of the constitution had been completed, affords the first instance of high comedy in the field of organic law. The story is told in the New Jersey Law Journal (May 28, 1942), an independent weekly publication, of unusual value to the legal profession, which is ably edited by Joseph Harrison.

Governor Edison, elected in 1940, stressed the need for heroic work in the constitutional field, and the New Jersey State Bar Association authorized appointment of a committee to assist the Governor. On May 20, 1942, Mayor Hague of Jersey City announced opposition to the proposed revision. From this point we quote:

"May 23, 1942, State Bar Association urges rejection of the revised constitution accompanied by some excoriating vituperation against Governor Edison.

"No charges of the Association being 'controlled' or being used as a political football can be more persuasive than this record in cold print. As a result a valiant few members must have been chagrined, but they can walk with heads high. Many who should have known better will feel ashamed at their lack of courage. . . .

"President William J. Connor has his work cut out for him if he hopes to salvage what once was at least a respectable bar association. He will soon learn, if he does not know it already, that he can expect little help from his official family. The controlling influences of the Association are past masters of both political and bar association chicanery and scheming. To them the State Bar Association is but another instrument of political machination.

"Never has the State Bar Association stultified and degraded itself more patently than it did last Saturday at Atlantic City."

A LEFT-HANDED ENDORSEMENT

It appears obvious that Boss Hague and bad government have fearless (or shameless) representation in the Bar Association. That was equally apparent when, in 1937, a well conducted campaign for bar integration was defeated.

The voluntary association is disgraced, but one must assume that the dishonor was accomplished by minority control at a critical hour. This could not have happened if control had been in the hands of delegates or officers duly chosen by the ballots of all members. It could not happen in any of twenty-five jurisdictions in which the lawyers possess practical, realistic and responsible organization.

The voluntary bar association is usually, but not always, better than none at all. It is often a reluctant agent in approaching bar power and responsibility but there is no other route.

In the present case bad manners and bad judgment have no weight, unless to stimulate lawyers hitherto indifferent to the welfare of their profession.

Minnesota's Proposed Judiciary Article

The sub-committee headed by Justice Charles Loring, of the Supreme Court, has long been at work on what might well be called an ideal judiciary article; meaning thereby the best and most practical article that can be framed for the benefit of a specific state.

Any modern judiciary article begins as does this one, which creates first a "general court, which shall have all of the jurisdiction at any time vested in the courts of this state." Seven justices constitute the supreme court, which may, by direction of the chief justice, sit in divisions of not less than three members. That is an excellent start. There is an administrative council and an administrative director, vital features of any modern judicial system. The supreme, district and county court departments shall be represented in this council, with the chief justice, or one designated by him, as director. The representatives of the three divisions are to be elected by their colleagues for terms of two years. "The council shall have supervision of the administrative organization and operation of the General Court and its various divisions, and may prescribe the duties of the administrative and clerical personnel thereof." It shall select the Administrative Director, a person learned in the law.

A well conceived county court is provided, with inclusion of probate judges and jurisdiction, except in the more populous counties. Jurisdiction in contract actions is to one thousand dollars, and in criminal cases to those in which imprisonment does not exceed three months.

The draft affords proper flexibility where needed. For instance: "Every member of each division of the general court shall be eligible for temporary service in any other division and in any district or county, as the case may be, of any division." Assignment is made in accord with rules to be made by the Administrative Council.

HOW JUDGES ARE CHOSEN

The selection and tenure provisions have been debated for more than a year. In the latest submission a new and very promising system is presented.

Sec. 8. There shall be a commission of five in each judicial district, three of whose members shall be lawyers residing and practicing in the district elected by the bar of the district under rules promulgated by the supreme court, and two of whose members shall be laymen residing in the district, appointed by the governor. The commission shall elect one of its members chairman. When a vacancy occurs in the office of the district judge in any district the commission shall nominate and present to the chief justice a panel of three persons learned in the law from which panel he shall fill the vacancy by appointment.

When a vacancy occurs in the office of a justice of the supreme court the chairmen of the district judicial commissions shall constitute the supreme court judicial commission, which, under rules prescribed by the supreme court shall nominate and submit to the governor a panel of three persons learned in the law from which panel the governor shall fill the vacancy on the supreme court by appointment.

When a vacancy occurs in the office of county judge the members of the bar of that county under rules prescribed by the supreme court shall nominate and submit to the chief justice a panel of three persons learned in the law from which panel the chief justice shall fill the vacancy by appointment.

Each judge so appointed holds office "until the first Monday in January following the general election which occurs next after the expiration of one year of tenure in office. Not less than sixty days prior to the general election next preceding the expiration of his term, any member of the court, whether in office by appointment hereunder or by virtue of incumbency at the taking effect of this amendment, may file in the office provided by law a declaration of candidacy to succeed himself. If such declaration be not so filed by any member of the court, the vacancy resulting at the expiration of his term shall be filled by appointment as herein provided. If such declaration be filed, the name of the justice or judge shall be submitted to the voters of the state, district or county in which he holds office at said next gen-

eral election by a separate judicial ballot, without party designation, reading:

"Shall Justice or Judge ..... of the ..... Court be retained in office?" The voter marks either a "yes" or "no."

No existing scheme of securing able judges and giving them needed security of office has received more study than the foregoing. The plan differs a little from the plan established by the American Bar Association but has undoubted merit in utilizing local talent and knowledge. After a sufficient test in service the voters determine whether the judge's work is, or is not, satisfactory. Under such a system the best qualified lawyers will not decline a nomination because of fear of defeat at the polls. Political interest, aid or intimidation cannot exist.

The full terms after popular ratification of an appointee are: for supreme court justices, ten years; for district court judges, eight years, for county court judges, six years.

Not only are supreme and district judges forbidden to hold any other office whatsover, but for one year after the expiration of their terms, or after resignation, they are ineligible to hold any elective office. Upon retirement at the age of seventy a judge shall receive half of his salary.

The clerks of court and the reporters are to be appointed, and serve as long as the judges are satisfied.

IDEAL ADMINISTRATIVE COUNCIL

Hardly less important is the provision for the management of the entire state court through an Administrative Council, comprising representatives of the bench in the three divisions, supreme, district and county. The chief justice, or a judge by him appointed, becomes chairman. Terms are for two years. "The Council shall have supervision of the administrative organization and operation of the General Court and its various divisions and may prescribe the duties of the administrative and clerical personnel thereof. It shall designate a person learned in the law as the administrative head of the General Court, who shall be known as Administrative Director and who shall have direction of all administrative matters pertaining to the General Court. . . . He shall be subject to the authority of the Administrative Council," etc.

"The Council shall have power, by rules approved by the Supreme Court, to enlarge or reduce the jurisdiction herein conferred upon the District and County Courts, without, however, invading the jurisdiction of the Supreme Court; to create subdivisions or departments, and make provision for assignment thereto of the judges to preside therein; to designate places for the sittings of said courts . . . to change the number and boundaries of District Court districts . . . and with the concurrence of the governing bodies thereof to merge two or more counties into one County Court District."

By which future needs may be properly met. The absence of such power in our judicial systems has made them forty years behind the times. The lack of needed power is a common cause for the absence of responsibility.

All rules made in accordance with the provisions of this article, whether by the supreme court or the Administrative Council, and rules adopted by other divisions pursuant to authority delegated by the Supreme Court, "shall have the force and effect of law and shall supersede all statutes inconsistent therewith."

Under such a system there need be no overworked judge and no idle judge. The cost of operation would be materially reduced and the product would in all respects, and especially as to punctuality, be better than has heretofore been known in our rigid, unmanaged systems.

IF A NARROW construction were placed upon rule 26 (b), the court would rule that the papers and documents sought should not be produced. The purpose of the federal rules of civil procedure, however, is to cut through the maze of technicalities which have heretofore existed, and to enable the court to do a greater measure of moral justice under the law.—*Grover M. Muscowitz, J.*

Model Judiciary Article and Comment Thereon

For more than twenty years the National Municipal League has devoted much effort to the improvement of state government. Before its first model state constitution was produced in 1920 the League had achieved renown by its leadership in the reform of city government through practical modernized charters. It had long continued the work of the Short Ballot Organization and the Proportional Representation League, pioneers in governmental planning.

Study of all the needs in the field of state government has been pursued by the League steadfastly. The latest revision of its model state constitution may be obtained at the League's office, 299 Broadway, New York City; price fifty cents.

It was thirty years ago that the American Bar Association became convinced that numerous vital improvements in judicature were needed and could be acquired only through constitutional amendment. The American Judicature Society, chartered in 1913, produced in the following year its first draft of a constitutional amendment designed to permit the adoption of a model state court system, with the first complete text covering all essentials.

The plans made by the American Bar Association and the American Judicature Society have never been seriously criticized. The principles involved were long ago settled and accepted. Nothing has prevented widespread reform in judicial administration except the difficulty of amending state constitutions.

There are certain states in which conditions might be considered tolerable. They are the thinly populated states in which conditions have not much changed since the pioneer type of judicature was written into the organic acts of the territories, and later lodged in constitutions. Exception to a general condemnation should be accorded also to the three northernmost New England states, where political stresses have not been excessive and a simple type of judicial organization, improved from time to time, continues to serve fairly well.

As might be expected, the states that have most suffered from constitutional stalemate are those of rapid population growth. But this must be said, that while states of that type serve as "horrible examples" several of them also have made specific reforms, especially in courts of limited jurisdiction, which have, under adverse conditions, given convincing proof that the principles of judicial administration set forth in the Judicature Society's unified state court plan and the Municipal League's model constitution, can be relied upon to accomplish the reforms that are needed.

There is nothing in these principles that is experimental or at all hard to understand. Any high school graduate, any person who has observed the organization schemes essential to carrying on a business, large or small, will readily see what is lacking in the field of judicial administration, and how that lack can be remedied.

The Municipal League Model Constitution is, of course, adaptable to any state. It deals, as a constitution should, with the organic features of government.

FUNDAMENTAL PRINCIPLES ESTABLISHED

What is fundamental, organic, in a judicial system? The answer is: there are two fundamental factors. One is the mode of selecting the judges; the other is the nature of the organization in which they will function.

With these two elementary problems solved there will be efficient administration of justice. Get fit men and provide them with a simple scheme of organization, which enables every judge to work to the best of his ability. These are the fundamental principles. They apply as well to government as to business. Successful schemes of organization for business were acquired by experimenting. There was competition between various kinds of organization and the fit kinds survived.

In the judicial field there has been limited opportunity for experiment. But in the average state the volume of work and the kinds of work have increased every year for generations; there has been commonly an increase in the number of judges but, with a few exceptions, no proper and sufficient means for enabling the judges to work in a cooperative man-

ner. The exceptional instances have been mainly in large city courts in which a measure of superintendence has vastly increased judicial efficiency.

FEDERAL SYSTEM NOW A MODEL

The remarkable progress made in improving the administrative side of the judicial function in our federal judicial system makes it now much easier to make plans for any state system. The management of all the courts in the ten circuits and District of Columbia, having nearly two hundred trial judges, is now definitely lodged in the Conference of Senior Circuit Judges. This Conference has the same function as the administrative "judicial council" long recommended for state systems. At the head of the Conference, is the Chief Justice of the United States.

The Conference of Senior Circuit Judges makes rules and orders of many kinds as a means for directing the administrative officers of the courts and for facilitating the work of the judges. The Conference utilizes as its agent for carrying out its administrative policies, and for the collecting and reporting of statistics, needed as a basis for management in any judicial system, the "Administrative Office of the United States," which was created only recently and was given duties and powers theretofore lodged in the Department of Justice, an executive, and not a judicial agency, engaged mainly in enforcing criminal laws by detection and prosecution.

It took a little more than twenty years to bring the federal system from a condition virtually devoid of management, to the present status. Chief Justice Taft, who for many years before had preached the need of "business management for courts" succeeded in inducing Congress to create the Conference, but it had only meager authority as long as the attorney-general's department controlled all the ministerial officers.

More or less coincident with the organization of superintendence within the body of judges came the movement for providing a uniform code of civil procedure for the federal trial courts, which for two generations had labored under staggering difficulties imposed by Congress in 1872. The act of 1934 authorized the Supreme Court to provide a complete body of rules for civil cases. The Court employed the highest talent in the legal profession and the result was actual use of the new rules in January, 1938. The civil rules gave such satisfaction that almost immediately efforts began in many states to reform civil procedure in like manner. And, under a later act, the Supreme Court has recently set another rules committee at work to provide ideally good rules for criminal cases, a reform more than a century overdue.

In pioneer days there were only a few judges in each state or territory and they worked together as judges should. This system became what we are too well used to—virtual lack of system and an absence of cooperation and joint responsibility.

The federal system as recently organized offers a fine example of what the state should provide to make cooperative study of administration and joint responsibility possible. Administrative power is centered in the senior circuit judges who have the fully equipped administrative office to serve administrative needs of many kinds. The circuit (appellate) judges constitute together a circuit judicial council that meets every three months to study "production sheets," and plan efficient utilization of the time of the district (trial) judges.

All the judges in each circuit are convened once a year to devote two or three days to a consideration of better means for disposing of judicial business. These conferences are of the highest value. The experience and the enthusiasm of certain judges become the property of the entire staff.

Within the average state, the need for exchange of experiences is just as great as in the continental court, and in very few states has there been any effectual means provided for conserving experience or of employing special talents in special types of cases. The typical state trial judge is expected to excel in a score of different fields of law, procedure and practice. He is, commonly, given no choice as to his range of work. He is likely again and again to struggle to familiarize himself with a certain kind of work and then never again have an opportunity to profit from his experimental effort. We make the trial judge a jack of all trades and we are lucky if he becomes a mas-

ter of a few. And all for lack of a common sense administrative system.

The virtual perfection of the administrative machinery of the federal system is certain to influence opinion in respect to improvements in state judicial systems, most of which have waited far too long without needed superintendence.

Their structure and their needs are much simpler. A council comprising the heads of the various districts, the chief justice, and representatives of the bar, the legislature and the laity, as set forth in Section 606, *infra*, makes an ideal administrative agency.

THE IDEAL COURT ESTABLISHED

Let us now proceed to consideration of the Municipal League's judiciary article in its Model State Constitution.

Section 600. Establishment of the Judiciary. The judicial power of the state shall be vested in a General Court of Justice, which shall on and after January 1, ——, exercise the judicial power heretofore vested in any court in the state. The legislature shall provide by law for a supreme court department, and for such other departments, divisions or special tribunals, and for such judges as may be required to handle the judicial business of the state properly.

Comment. "To handle the judicial *business* of the state properly," this phrasing is chosen deliberately to emphasize the fact that there should be *business methods* in a court. It will not be found in any existing state constitution.

This section properly continues all existing judicial power.

It is suggested that there should be also permission for the legislature to provide the judges of the general court with power to administer judicially such statutes as the legislature may in the future determine and specify. There are in every state a number of statutory boards created for the purpose of administering various laws in what has been commonly called a "quasi-judicial" manner. If the states had possessed judicial systems properly organized these new functions would have been assigned to the judiciary. Much of what is being done in our surrogate, or probate departments, is as "ministerial" as what is done in a number of "administrative agencies." A shining example is the workmen's compensation board. Its work should have been left to judges with such rules as would effectuate modern policies. It should be obvious that a properly constituted state judicial system can perform many of the newer judicial functions now in the hands of boards and commissions. Advantages bestowed on these boards—absence of jury trial, hearings before a group of experts, and so forth—should be possessed by the judges. One such group of judges could soon acquire all the law and procedure employed by several boards and could centralize all such work, or provide for hearings in every county, according to the convenience of the public.

A very serious objection to this vital section is that it leaves the organization of the General Court wholly to a legislature not yet created. The time for expressing ideals concerning organization is when the judiciary article is being drafted. Lawyers and judges, at least, will not agree to permit the legislature to receive blanket authority to dispose of the state's judicial personnel and machinery.

Another strong reason for defining organization, at least in general terms, in this judiciary article, is that the Model Constitution has existed for twenty years as a form of *instruction in government*. The one thing most needed, as instruction, is the nature of a modern organized state court system.

It appears necessary because of this omission to sketch the system appropriate to modern needs.

Preceding editions of the Model Constitution have provided that there shall be, besides the supreme court department, two others; namely the district court system, having general trial jurisdiction, and the county court system with limited jurisdiction.

The district court system would consist of districts of sufficient population to imply a need for eight, or ten, or more judges in each district. There would then be an executive judge to superintend the distribution of work in each district. These executive judges (designated "presiding judges" in Section 605) would be members of the administrative judicial council, together with the chief justice (as chairman), one or more other supreme court justices, and representatives of the State Bar and the legislature.

A county having a population large enough to

require eight or more judges would constitute a district; this would be the case even if there were fifty or more judges in one county; and all would be district judges.

A present day system abandons the county organization plan with its judge and various magistrates having only *limited* jurisdiction. We now have eight years of experience with a far better system, which was evolved in Virginia and has been sufficiently tested to prove its superiority.

THE TRIAL JUSTICE SYSTEM

The Virginia system is this: in counties in which the supervisors have voted to dispense with justices of the peace the circuit judge (equivalent to district judge), if he agrees, shall appoint an assistant to serve for a term of four years. This assistant of course will be a lawyer. He will take such classes of cases as may be assigned to him from time to time by his superior officer. His will be a mobile court, prepared at all times to convene court at the place most convenient to those concerned. The Virginia law provides that such an assistant judge may be appointed for any of the larger cities that realize the need. In thinly populated areas one assistant judge may serve two counties, or there may be half-time service.

The name adopted for this new kind of magistrate is "trial justice." It would seem more fitting to call him a commissioner, or a master, terms well understood in the law.

In the beginning of this notable movement the Virginia legislature was moved to act for the benefit of certain of the more populous cities or counties. The effect was so good that other counties and cities insisted on taxing themselves to pay salaries to "trial justices." The system spread rapidly until Virginia had completely solved the problem of administering justice expertly and economically as to small cases throughout both urban and rural localities.

The state was most fortunate in having a constitution which permitted the legislature to experiment. It was most fortunate in having legislators who proceeded with common sense as a guide. They wanted efficiency and they wanted economy. They succeeded beyond their expectations.

By 1940 there were ninety "trial justices" in Virginia, and a majority of them were paying dues to a trial justice state association, created for the purpose of enabling its members to share experiences and improve service.

Observe the factors of the system so set up. The untrained, fee paid justices of the peace were supplanted by responsibly selected lawyers. In place of mere neighborhood jurisdiction the trial justice has jurisdiction in a large city, in a county or in two counties. He is answerable for all he does to the circuit judge who appoints him, and may discharge him. The judge himself is dignified by having an increased responsibility, especially as to criminal cases. The judge and the trial justice are able at all times to confer concerning special problems.

If there is in any nation a better solution for the heretofore unsolved problem of expert and responsible judges in the very important but least dignified fields, we have not heard of it.

Observe that the work of the trial justice is conspicuous, that it offers great values in training young lawyers, that it may prepare for a higher judicial post, and if not, then assuredly for a profitable law practice. There are few of the well trained younger lawyers who would not be available for such a post, and who would not establish a good record.

Perhaps most important of all is the obvious fact that this system creates a body of experienced, well tested, competent lawyers from which future judges are likely to be chosen. It has been customary to select judges of advanced age, with habits established, but with no experience in the office which makes greater demands on the individual than any other.

The Virginia system creates a school for judges; but the novitiates must already have met all educational requirements for the practice of law and must have spent some time at least in the service of clients. By assisting a judge of full trial jurisdiction they round out their training and have much to offer the public in either capacity, as lawyer or as judge.

ONLY ONE BODY OF TRIAL JUDGES

The success of the assistant judge system enables the student of government to assert that we need in any state only one body of

trial judges.[1] The constitution should provide that these judges, under certain provisions, should appoint trial justices (better called commissioners or masters) to take any judicial work assigned to them and especially cases formerly tried by magistrates.

According to this principle certain judges previously restricted as to trial jurisdiction, such as surrogates and municipal court judges of experience, would become, under the new dispensation, judges of full trial jurisdiction, but subject, of course, to service in the fields of law to which their qualifications and experience best adapt them. The former magistrates would be tried first as trial justices, subject, at the end of their terms, to be released.

Because the trial justice is to be appointed by a competent official, to be that official's assistant, it should not be necessary to impose conditions other than that the appointee be a lawyer of five years actual practice and not a son, daughter, niece or nephew of the district judge or his wife.

There remains one other principle deserving expression in the constitution. The district judges should be empowered to serve as judges of appeals under rules to be made by the Judicial Council, so that in case of need the Council or the supreme court could select trial judges to sit with supreme court justices and thus augment the capacity of the appellate department. In many of our states supreme courts far in arrears have been provided with salaried lawyers to assist in deciding cases and writing opinions and it is no secret that these specially appointed "commissioners" are often, even without bench training, of greater judicial ability than some elected and experienced justices. Under adverse conditions groups of lawyers in various parts of a state have studied cases on appeal and submitted decisions and opinions that have greatly assisted an overloaded supreme court.

The authority should be sufficiently broad to permit of disposing of certain petitions for review by a bench of three trial judges, in case the Judicial Council should find this method to be serviceable. The supreme court justices should likewise be made available for the trial of cases, civil or criminal, at the discretion of the Council or the chief justice. In England it is commonplace for the Lord Chief Justice to go out on circuit and try ordinary suits, and not because he has political fences to keep in repair.

The interchange of work between appellate and trial benches can be a wholesome thing. It is often said that the trial judge is the most important factor in the administration of justice. It is truthfully said. No judge is too eminent for determining the rights of the citizen or of the state. But for interpreting the terms of the state constitution, or the federal constitution, we incline strongly to our practice of restricting the function to a very few individual judges. We have no superior means for selecting these judges of supreme courts. Under any mode of selection there will be a great deal of guesswork, as we all know, until we restrict appellate court service to judges who have already given some token of their abilities and temperament, in the only other function, trial room work. The suggestion above made would permit of testing trial judges as to their talents in the field of appeals.

A QUESTION OF RESPONSIBILITY

Section 601. *Jurisdiction of the Courts.* The General Court of Justice shall have jurisdiction to hear claims against the state, and such other powers and jurisdiction as may be conferred upon it by law. The legislature may delegate to the judicial council the power to determine by general rules the jurisdiction of departments of the General Court of Justice other than the supreme court.

The last sentence of Section 601 empowers the legislature to "delegate to the judicial council the power to determine by general rules the jurisdiction of departments of the General Court of Justice other than the supreme court department." It is possible to have profound disagreements as to the precise meaning and effect of this rather vague language. It is to be condemned on the ground, first, that it divides responsibility. Further, our judicial systems have been so rigid that it will require more or less experimentation to determine the internal operation of "departments." We only know that great improvements may be made. There would doubtless be various arrangements

1. The Virginia "trial justices" are not judges. They are comparable to masters or commissioners and are subject to control by a respnsible judge.

to adapt administration to varying needs in cities, suburbs, and rural counties. The conclusion is that the legislature should be given no such power. If the judicial council cannot administer this power and responsibility it cannot perform the more delicate functions of assigning judges and cases. The legislatures have always had such power, and experience shows that it takes vast effort to get just a little consideration for long needed changes.

From this section there has been stricken a provision giving the supreme court the power to sit in two or more divisions. It would be safer to leave that in, because it is absolutely essential that in a state of average population it be possible to have more than one appealed case under consideration at the same time. For most appeals three justices is an ideal number. Five should be sufficient for almost any purpose.

These requirements permit of having more supreme court judges than is customary, and in the more populous states a larger number would be necessary. It is entirely feasible to have a number of supreme court divisions in operation, and much better than to impose an intermediate appellate court between trial and final disposal. Provision can be made for the harmonizing of opinions.

It is suggested that in such a large supreme court department in a metropolitan state the determination of constitutional questions might well be reserved to a bench of seven of the justices who have served the longest. This is not the convenient place for dealing with all possibilities.

Supreme care is needed in constitutional drafting lest the constitution be made needlessly narrow. Under our primitive, rigid court systems, the appellate courts are overworked, and usually far behind with their products. If there is any place where the state can afford to spend money it is in providing adequate trial and appellate benches. Delay never benefited any judge, any lawyer or any litigant without injustice to deserving persons.

AN EXCELLENT SELECTION PLAN

Section 602. *Selection of Judges.* The chief justice shall be elected by the qualified voters of the state at a general election on the first Tuesday after the first Monday in November, in an odd numbered year, beginning two years after the first election of a governor under this constitution. He shall hold office for a term of eight years, beginning on the first day of December next following his election.

The chief justice shall be a member of the supreme court department and shall appoint the judges of the various departments of the General Court of Justice from an eligible list containing three names for such vacancy, which shall be presented to him by the judicial council. The term of office of each judge so appointed shall be twelve years, subject to removal as hereafter provided. After any judge appointed by the chief justice shall have served for four years, the qualified voters of the state or of the judicial district which he is serving shall decide at the next regular election whether such judge shall be retained or removed from office. A separate ballot shall be used (unles voting machines are employed) in such election on which there shall appear no other question than that of the retention or removal of such judge. If a majority of the votes cast are against retaining such judge in office, the chief justice shall appoint his successor for a term of twelve years, subject to recall as provided in this section. If a majority of the votes cast are in favor of retaining such judge, he shall continue in office until the end of his term. All vacancies caused by death, resignation or retirement shall be filled in like manner, for the full term.

This section provides the best system of choosing judges and of determining how long they shall serve that has been worked out during the thirty-five years since the "recall of judges" movement gave the country a great scare. Starting at the West Coast the recall of judges by voters at special elections spread nearly to the Mississippi River. In thirty years there have been only a very few recall elections. No damage was done, and very little good. But the campaign had a value in arousing interest. The evils of short terms, of obliging excellent officials to be virtually always on the political firing line, to be obliged to meet all-comers in a free-for-all scramble for nomination and election, have continued. Judges are far less afraid of recall elections than of the ordinary kind. The problem, obviously, is to make the work of the judge a lifetime career if he is found to be fit. Judges are not like any other kind of officials. It is difficult to find all the qualifications in any one lawyer who is willing to abandon his successful practice to take a post that may set him adrift a few years later. Judicial experience is a precious thing, to be preserved as long as possible.

Section 602 makes adequate provision for a chief executive who could fill the limited role accorded him in the selection of other judges. The nominating power is so circumscribed as to come as near to guaranteeing good material for the bench as can well be conceived. The plan also has the virtue of affording the chief justice no opportunity for trading. Ambitious lawyers would have nothing in the way of political favors to tempt the chief justice, and no person or interest could profit by threatening him. The system has the cardinal virtue of lodging appointive power in a conspicuous official whose highest interest is to see that able judges are chosen in order that his own career may be enhanced; there is safety by reason of limiting his choice to three persons who are chosen by the members of various interests who constitute the rather large judicial council. Some chance is taken in respect to the ability of a popularly elected chief justice to learn how to manage a large institution; as to that it may be said that the policies would be determined by the judicial council.

It will be understood that the chief justice does not appoint any of the judges whose terms have not expired before the establishment of the new General Court. His appointments begin later when vacancies occur.

SHOULD PROTECT CHIEF JUSTICE

One of the tremendous values of this system lies in the fact that there will be few vacancies in any one year, or any eight year period. Instead of all the judges being bedevilled every four or six years with political campaigns to save their lives, there will be only the referendum vote after four years, which can harm no worthy incumbent, and then eight more years of the twelve year term. The number of appointees per year will be about the same as the number of retirements. If the average period of service is thirty years and the number of judges is thirty, there would be on the average one new appointment each year. That conserves the principle of making selection a conspicuous function performed by representatives of the people who have reputations based upon ability and character rather than a mere incident in a campaign in which scores of candidates compete in primaries and elections.

The judiciary article should contain one more provision; that upon the failure of the chief justice to be reelected at the end of his term he should remain as a judge of the General Court with a term like that of the other judges. By giving him this protection he will be largely relieved of political interests. That he be so freed is very essential for the unbiased operation of his power of appointment. In other words, when he is to choose one of three nominees for the office of judge, he should not need to calculate his own chances of remaining on the bench. If the salary of the chief justice is the same as other supreme court justices, as suggested, his independence will be further conserved. There is no reason why it should be more.

EXECUTIVE LEADER PROVIDED

Section 603. *Powers of the Chief Justice.* The chief justice shall be the presiding justice of the supreme court department and a member of any division thereof. He shall preside over meetings of the judicial council and shall be the executive head of the General Court of Justice, exercising such powers as are herein contained or may be hereafter conferred by law, or by rules not in conflict herewith or with the statutes, made by the judicial council. It shall be the duty of the chief justice to organize and administer the General Court of Justice. He shall cause to be published an annual report covering the business done by each department of the General Court of Justice and stating the condition of the dockets at the close of the year. He may require periodic or special reports from the presiding justices of each department on the state of judicial business and operation of said departments. He shall appoint the clerk and other ministerial agents of the supreme court department as may be authorized by law.

It would be well to provide that statistical reports be made available at least to all the judges every month.

WHY DISTRUST JUDICIAL AGENTS?

Section 604. *Judicial Districts.* The judicial council shall have power to alter the districts into which the state may be divided for the handling of judicial business, in so far as the legislature does not otherwise provide, but any such order of the council may be amended or revoked by the legislature.

Here again we see a lack of confidence in the ability, or the knowledge, of the judicial council. The defining of districts involves practical questions of which the council will have more

knowledge than any other body, and will have no interest whatsoever except to make administration as effective as can be. But some localities are certain to demand special consideration. If the judicial council, with a total lack of personal interest, does not comply, then the legislators will be besieged, and the question as to which town shall have certain sessions of court will first bedevil the legislature and later the General Court. It is better to centralize responsibility, and in the more expert body.

THE DUTIES OF THE PRESIDING JUDGE

Section 605. *Judges of Inferior Court Departments.* The chief justice shall assign the judges of the inferior court departments to the several districts. Any judge shall be eligible to sit under temporary assignment in any district.

There shall be a presiding justice in each district who shall be appointed by the chief justice from among the judges of such district and who shall serve until his retirement or his removal as presiding justice by the judicial council. The presiding justice in each district shall have control over the calendars in the courts in his district and over the assignment of judges within his district, subject to rules made by the judicial council, and shall appoint clerks and magistrates and such other ministerial agents as are authorized by law for his district.

Excellent, but by all means get rid of that word "magistrates," which has no definite meaning and not a very agreeable odor. There should be nowhere any use of the word "inferior" as applied to courts or judges. A judge performing a "special" service is by no means inferior. He is a specialist judge.

JUDICIAL COUNCIL—HOW CONSTITUTED

Section 606. *Establishment of Judicial Council.* There shall be a judicial council, to consist of the chief justice, and one justice of the supreme court department and two judges of the inferior court departments to be designated for four years, by the chief justice; three practicing lawyers, to be appointed by the governor for overlapping terms of three years, from an eligible list containing three times as many names as there are appointments to be made and presented to him by the governing board of the state bar association; three laymen citizens of the state to be appointed by the governor for overlapping terms of three years; and the chairman of the judiciary committee of the legislature. The judicial council shall meet at least once in each quarter, at a time and place to be designated by the chief justice.

It may be said emphatically that instead of providing the judicial council with "two judges of the inferior court departments" the text should say: "the presiding judges of the several districts." It is only by making the administrative heads of the several districts members that the judicial council can be properly representative of the entire system. The council needs these heads, and they need the direct personal influence that the council can confer.

In a large state there may be ten or more districts and, nevertheless, each district must have its presiding judge, and he must be a member of the judicial council. With also three practitioners, three laymen and one legislator, the council would be unnecessarily large and somewhat unwieldy. While it is advantageous to have specially selected lawyers and laymen in the council, they should not have, altogether, more than about one-third of the total number of votes. It might be well to give the lawyers and citizens and legislators each one-half of a vote. That would be far more generous than to merely confer advisory power. In a small state it would be essential to provide that the seven council members appointed by the governor be not capable of outvoting the judicial members.

JUDICIAL COUNCIL MADE RESPONSIBLE

Section 607. *Powers of the Judicial Council.* The judicial council, in addition to other powers herein conferred upon it, or hereafter conferred by law, shall have power to make or alter the rules relating to pleading, practice and procedure in the General Court of Justice, and to prescribe generally by rules the duties and jurisdiction of masters and magistrates; and also to make rules and regulations respecting the duties and the business of the clerk of the General Court of Justice, and his subordinates and all ministerial officers of the General Court of Justice, its departments, divisions or branches. The legislature may repeal, alter or supplement any rule of procedure by a law limited to that specific purpose. No such rule made by the judicial council shall be effective until published as provided by law.

Again strike out the word "magistrates." "Masters" may stand providing the Virginia system of administering justice is adopted, and the word will then mean an assistant judge, with no fixed tenure; it will also mean what

the words "master," or "circuit court commissioner," have long meant in this country. We shall have masters immeasurably more useful than formerly, and they will be on salary, and so incapable of enriching themselves unduly.

The balance of power between legislature and court in respect to rules of procedure is here set forth. The legislature has the final power. The initial responsibility is placed where it should be, in the judicial council. This complies with one of the most essential principles of court organization. It is impossible for even the best judges to render good services when procedure is unsuitable. Several generations have suffered from an inheritance of medieval procedure. Ninety years ago our states began what should have been a triumphant march toward relief; much progress was made, but due to the fact that procedure was in the hands of legislators, rather than judges, another tedious campaign for a right principle has been waged for thirty years, culminating finally in a workable system in the federal judiciary.

Section 608. *Removal of Judges.* The legislature may, upon due notice given and opportunity for defense, remove from office any judge, upon the concurrence of two-thirds of all the members elected. Judges of the inferior departments of the General Court of Justice and all ministerial agents of the General Court of Justice, may be removed, for cause, after due notice and opportunity for defense, by the judicial council.

Except for the use of the term "inferior departments," this section is probably as good as can be conceived. Judges subject to removal by a legislature are in no danger of injustice, as is proved by the history of many states over many years when no judge ever has been removed by "concurrence of two-thirds of all members elected." There is no danger, but, in view of the fact that there must be a serious scandal to induce a legislature to act, what is to be done about lazy, inefficient, chronically ill judges, or those whose faculties have deteriorated? There's an answer to that question in the history of large city courts that have an administrative head. The answer is that the power to assign judges to special classes of cases permits of getting the best that they can give. There is also the resource afforded by meetings of the judges, which permit of open discussions of all defects in organization. With our careless way of selecting judges in most states, and the lack of cooperative management of court business, our ordinary "system" encourages bad habits. Judges are human; and hence they deserve all the advantages that cooperative self-government can confer on them; it can greatly assist them to employ to the best advantage such resources as they may possess. The power to remove district judges conferred by this section is essential in any proper court system, but might never be actually used.

Section 609. *Compensation of Judges.* All remuneration for the services of judges and court officials provided for under this constitution shall be paid from an appropriation by the legislature. The annual compensation paid to the chief justice or to any judge shall be neither increased nor diminished during the term of office to which he shall be appointed. The legislature may by law provide for the apportionment among the several counties of the state of the expense of the maintenance of the General Court of Justice.

It is not uncommon for the state to pay a fixed judicial salary throughout the state with an expectation that county boards shall voluntarily add something to the "base" salary. In some cities judges receive more than half of their pay from the city or the county. It is obvious that they should never be placed in a position that makes them beneficiaries of city or county officials. This relationship is prejudicial to justice by tempting the judge to be a politician. The "apportionment" plan avoids that evil.

This section does not imply that all judges are to receive the same salary. There may well be grades based upon locality of service, nature of service, and length of service. There should also be opportunity for the legislature to award limited pay for limited services after retirement, as is the case in the federal system. Elderly judges should find retirement an easy step, not a disaster; at the same time the institution should be able to utilize them in special and less laborious posts. It is desirable also to provide that the chief justice shall receive the same pay as other judges of the supreme court.

Section 610. *Fees, Costs and Fines.* All fees collected in any department of the General Court of Justice and all masters' fees shall be paid to the clerk of said court and shall be

accounted for by him monthly and paid to the state treasury. The judicial council shall have power to establish or alter fees to be collected in the several court departments of this state, subject to such general regulations as the legislature may by law establish.

No comment.

Section 611. *Ineligibility of Judges to Other Offices.* No judge shall hold any office or public employment, other than a judicial office, during the term for which he shall have been elected or appointed, and no judge shall engage in the practice of law or other private employment during his continuance in office. No judge shall be eligible for election to any non-judicial office until two years after the expiration of the full term for which he was appointed or elected.

The second sentence is admirable. There should be absolute protection of judges against pledges, or even hints, of political advancement upon retiring, whether by resignation or otherwise. It is not uncommon for judges to demonstrate such high ability as to make their services appear necessary in another field of government. Gossip alone may be prejudicial. A judge should at all times realize that he has dedicated himself voluntarily to a single very jealous service. He should be as free from the disturbing impulse to accept other duties as is an army or navy officer in time of war. It would be well if judges could be protected in the same manner from offers made by corporations. It is not that other good judges are unobtainable, but that the mere possibility of higher pay, and perhaps easier work, is prejudicial to a judge's mind and temperament. Let it be said again that a higher salary for the more experienced judges is a reasonable way of encouraging long service.

Section 612. *Disqualifications in Certain Cases.* No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as may be prescribed by law or where he shall have been of counsel in the case, or in the trial of which he presided in any inferior court.

No comment.

Section 613. *Writ of Habeas Corpus.* Each judge of any department of the General Court of Justice shall have power to issue writs of habeas corpus.

This section should be altered, limiting the issuance of writs of habeas corpus to the chief justice and the presiding justices of the several districts. The authors appear to be influenced by the need at times of protecting civil rights. Long experience has proved that in the pretense of protecting rights, outrageous offenses against justice have been perpetrated by cunning approaches to innocent judges. A limitation upon the right to demand release of a person seems to be necessary, if only to protect judges against conspiracies and midnight appeals. In an age of easy communication, by telegraph, telephone and automobile, a few only of the judges, and those conspicuous ones, should be subjected to this risk.

Chief Justice Should Take Part in Selecting Judges

"When it comes down to brass tacks there is no one who knows so much about the eligibility of lawyers and trial judges as the supreme court itself. Members of the bar are likely to confine their practice to limited areas or limited fields of jurisprudence. But the supreme court always has before it the men who are getting the actual experience in the rough knocks which the practice administers and by which they become seasoned jurists. That's one reason why I think that the chief justice of the supreme court can best make the selection for the other judgeships and why in the ultimate workout of the whole system it is best to get the chief justice in some non-political way."—*Justice Charles Loring, Minnesota Supreme Court.*

"The Welter of Decisions"*

PROFESSOR EDWARD H. WARREN†

"THERE is many an opinion which reads as if the judge had been having a real comfortable chat with his stenographer. I have devoted myself to such cases in a conscientious mood until I have revolted."

Edward Coke was disturbed by the growing body of reported opinions nearly four hundred years ago. Research might reveal a continuing body of complaint through the generations. Assuredly there would have been reversion to good sense and better law, if the digests had not been invented.

One of the addresses on this subject delivered twenty-six years ago by Professor Edward H. Warren contains so much of practical planning, that it is really of greater value today than when delivered. The occasion was a dinner given in Chicago December 29, 1915, by the Illinois State Bar Association in honor of the Association of American Law Schools. Refuting a suggestion that we were developing a common law in and for each state, Professor Warren said:

"We are living in a time when it is plain that the American people need to strengthen every force that tends to bind them together and quicken their consciousness of themselves as parts of one nation. Just as we want a common language, so, it seems to me, we want a common law, in the sense in which I have spoken of it. For the courts of any one jurisdiction to confine themselves to cases in their own jurisdiction is, to be sure, one sort of solution. But it seems to me that it is the kind of a solution to be likened to the throwing overboard of the cargo when the ship is in distress. . . "

The affirmative suggestions which I offer are four.

First: Let the court write no opinion, or, at most, a mere memorandum opinion, in the cases which do not deserve an extended opinion.

A few years ago one of the justices of the Supreme Judicial Court of Massachusetts told me that there was no real merit in three-quarters of the cases that came before that court. And yet that court goes on today writing an extended opinion in practically every case. There are very few cases that really add anything to the law; most of them are merely cumulative, at best. For a court to write an extended opinion to gratify the vanity of counsel in every case, but to direct that only a few be officially reported, would not meet the difficulty, for we should forthwith have in our midst some enterprising publisher who would bring out the unofficial reports.

I turn once more to Coke. After his enumeration of the books he proceeds to say:

"In troth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth and their records should grow to be like *elephantini libri*, of infinite length, and in mine opinion lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate."

Coke, with thirty volumes on the law, warning the judges not to report all their decisions!

The Court of Appeals of New York has set the country a splendid example which, I think, is not at present appreciated. Turn to the last volume, 215, of the records of the New York Court of Appeals; you will find that, excluding such things as motions for re-argument, the court disposed of 220 cases. Of these, 157 were disposed of with no opinion, or with mere memorandum opinions. In only 63, or 28 per cent of the whole, did the court write an extended opinion.

JUDGE SHOULD PREPARE HEAD NOTES

Second: Let the judges be required to write their own head notes.

It was my first thought to bring here and to read as horrible examples some of the head notes which have appeared in recent volumes.

*The address here quoted in part was published in Ill. Law Rev., Feb., 1916, Vol. X, No. 7.

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I have not done so because the cases might be identified and the personality of the reporter revealed. But I submit that frequently it is literally harder to read and understand the head note than it is to read and understand the opinion. In a great many cases it seems to me the fault is not wholly, or even primarily, with the reporter. There is many an opinion which reads as if the judge had been having a real comfortable chat with his stenographer. I have devoted myself to such cases in a conscientious mood until I have revolted. The reading of decision after decision of that kind does not increase a man's brain power—it actually deteriorates his mentality. It produces nothing but brain fag and brain fog.

It is the perfection of knowledge to be able to say true things in a few words. It is only when the judge is confused in his own mind that he cannot even sum up concisely. My first suggestion would buttress my second. If the judges wrote fewer opinions they could write better opinions.

The requirement that the judge should write his own head notes, that he should be able to state in a few words what is the point of what he is talking about, would not only save us from the work of inadequate reporters, but it would tend to save us from a mass of decisions in which no one can see wisdom except by a most benevolent inference.

LAWYER'S DUTY STATED

Third: The lawyers can help by confining their citations to a few pertinent cases or, at most, by sharply differentiating between the most pertinent cases and those which are merely cumulative. And while the lawyers may be a bit timid about doing that, yet I feel sure that they will not prejudice the cause of their clients by so doing. Not long ago a lawyer was arguing before a court in an eastern jurisdiction and he said: "Your Honors will find that, beginning at page so and so of my brief, and continuing thereon, I have collected all of the authorities on this point." The presiding judge leaned forward and said: "Did you put the best one at the top?"

A great mass of decisions does not aid the judge, it simply swamps him. And the judges are going to be more favorable to the men who present their cases in the more condensed way.

PROFESSORIAL HABITS SCORED

Fourth: The professors ought to help some. Again avoiding all personalities, I submit that most of the law books that are now put out consist, so far as the text is concerned, of loose, general statements which, on analysis, are seen to be inconsistent with each other, to which are appended dense black clouds of notes. The idea seems to be that all that is necessary is to get in all the authorities. There is but one God and His name is All the Authorities. Those books show infinitely more industry than brains. The scissors are mightier than the pen.

It is good to be learned, but it is so much more important to have a little wisdom. The kind of book which would be of great service and which, it seems to me, the professors really owe a duty to the community to produce, are the books which will state the problems concisely, and then discuss those problems, with great respect for the authorities and in the light of the authorities, but also in the light of what seems reasonable to the writer. I want to predict that such books will be gladly welcomed by the courts as an aid to them in discharging their duty of keeping our law so simple that it can be understood, and so reasonable that it can be approved.

And one last word: I have spoken of the lawyers and I have spoken of the professors, but I wish to make it plain that I do not over-estimate what either of them can do. The ultimate responsibility for keeping our law simple and reasonable must, under our conceptions, rest with the courts. The opinions which will command the respect of our people are those that are given with a full sense of official responsibility, with a consciousness that the judgment pronounced will have an actual effect on the human beings involved in the litigation.

To my mind the improvement of state government and of local self-government is a paramount duty and responsibility of lawyers, individually and collectively.—*William L. Ransom.*

Both Full and Abbreviated Opinions Found Useful

BY B. H. KIZER*

YOUR DISCUSSION of the "opinion writing problem" in the April issue of the JOURNAL reminds me that United States District Judge Lewis B. Schwellenbach[1] has recently adopted a procedure with reference to opinions that seems to be working out most excellently. I should like, therefore, to call your attention to it since it is actually tested in practice.

Judge Schwellenbach has been impressed with the fact that opinions in important and conflicting cases must sometimes necessarily be burdened with a very long recital of facts, a recital which is made for the benefit of counsel and the parties but does not concern the general public. Therefore, he is now writing two opinions—one in which he analyzes the facts in some detail, which is not meant to be published, and the other which contains the highly compressed statement of facts that is all the lawyer in general needs to know in order to understand the court's discussion and application of the law.

Thus, in quite a recent case his unpublished opinion on the facts comprised eleven pages. He compressed it to two in the opinion to be published which, added to a discussion of the law in six pages, meant an eight-page typewritten opinion instead of a seventeen-page opinion. In a later important case the factual opinion, not to be published, is ten pages long but, again, in the opinion to be published it is only two pages plus nine pages of discussion of the law, making a total opinion of eleven typewritten pages against nineteen that would otherwise have been necessary.

On inquiry by me Judge Schwellenbach tells me that this idea grew out of his interested reading of earlier issues of the JOURNAL on this problem of opinion writing.

While this is the method of a trial judge, lawyers generally will recognize that it is equally applicable to appellate procedure and if used in appellate opinions would result in many cases in a much higher percentage of compression of the published opinion than is indicated in these two quite important cases that Judge Schwellenbach has just tried.

*Of the Spokane Bar.

1. Of the Eastern District of Washington.

Members of Judicature Society Submit Ideas

Informal Conference Suggested—

"Opinions are often too long, and there are too many of them. Appellate judges would, I think, be glad to write shorter and fewer opinions. Whenever a united bar asks for shorter and fewer opinions the opinions will be shorter and fewer. . . . The answer is probably the use of greater care by counsel in the presentation of cases, and much greater care on the part of reviewing courts in abbreviating, so far as possible, their opinions.

"It is possible that some form of preargument or postargument conference might be of help in the simplification of cases and the elimination of the necessity of opinions. How practical such conferences would be, I cannot say."

Technically Known as a Mess—

"No American court feels itself bound by the decisions of the sister courts. Every tin horn jurist who mounts an appellate bench seeks to carve his name imperishably on the rock of time by writing a long-winded dissertation on the Whyness of the What, and the only way we can get relief from this intolerable situation is by the creation of an authoritative repository and exponent of the common law that state judges will have to follow.

"The proliferation of opinion law has got to

stop or we are sunk. The constant tendency to embroider established rules of law with exceptions, qualifications and mental side-steppings is producing what is technically known as a mess.

Florida Supreme Court Rule Twenty—

STATEMENT OF THE QUESTIONS INVOLVED

The prime or controlling questions to be answered shall be stated as concisely as possible without duplication or argument. The question, or questions, of law should be made to appear clearly, and should not be stated in the alternative. Each question should be stated and numbered in a separate paragraph and should be followed by a statement of whether it was answered in the negative or in the affirmative by the trial court, or if not answered, it should so state.

"Yes or No Answer" Called Sufficient—

"I realize that the vast burden of American decision law is due to the necessity for construing and applying new statutes. From that there is no relief. The only reduction of the tremendous burden of that work is for the courts to realize that all the profession wants is a yes or no answer. Such cases can be disposed of by a short statement of facts, a minute particularization of the contentions of the losing party and the answer of the court to that party, citing cases but not quoting them.

"Lawyers are satisfied if the facts are adequately stated to demonstrate that the court fully understood them; then the yes or no answer with the citations and authorities.

"For four years I had charge of the calendar in the Circuit Court of Appeals for the Ninth Circuit. I purposely began each brief with a chronological statement of the facts, in simple sentences of short Anglo-Saxon words. Then I stated the points involved and very meticulously stated the contentions of the opposition. Not infrequently the court lifted its statement of facts, points and contentions from my brief bodily; and even when they changed it, it was only to cut them down and make them shorter, eliminating matter which they judged unessential. I know that that form of brief writing was a great help and I am satisfied that that form of opinion writing would satisfy the profession.

"All the profession wants to know is that the answer is yes or no."

—*I. M. Peckham.*

A Suggestion From Connecticut Supreme Court—

In the Connecticut Supreme Court of Errors there is no formal rule requiring appellant's brief to set forth in a few words the principal facts involved, as in Pennsylvania and Michigan, but the information is nevertheless obtained. Richard H. Phillips, official reporter of decisions, explains the system, and it would appear probable that in a number of states the appellate courts would find it profitable to adopt one or another of these plans.

When the clerk of the court sends to attorneys the records before the hearing he includes a notice on blue paper which reads as follows:

NOTICE TO ATTORNEYS IN REGARD TO BRIEFS—

It would be of material assistance to the Court if the appellant, in the first paragraph of his brief, would state very briefly, without detail or discussion, the essential or principal issue or issues involved in the appeal. The statement should be framed in such a manner that by reading, it, the court, without being compelled to examine the argument of counsel or any other part of the brief or record, may quickly see the nature of the legal issues, and in a general way, what points it will be called upon to decide. Reference is made to the practice in Pennsylvania as outlined by an article by the then Chief Justice of its Supreme Court which appeared in the Yale Law Journal, vol. 34, p. 287 and particularly to the illustrations given on pages 294 and 295.

What Is a Vested Interest?—

"I do not believe admonitions to the judges to be brief will really be very effective in what you have termed the 'the torrent of opinion writing.' Lawyers expect and are entitled to that thorough adjudication of a case which competent and complete analysis of every point indicates, and a good opinion is the best assurance possible of that result. While judges ought to be encouragd to be brief they ought also to be encouraged to be complete; and I doubt if the total bulk of opinions will be much less when and as they are better prepared.

"The real problem comes because *so many vested interests* have grown up in the publication and republication of official legal material.

"Perhaps the remedy will be to make court records, to a limited extent at least, private, rather than public, although I suppose there are dangers in attempting to avoid the public control which the courts need. I think the real problem is rather covered up by the general tendency to hold the judges entirely responsible for the bulk of legal publications."